Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1977

No. 77-1396

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,

Petitioner,

v.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through ALLAN F. LARSEN, Speaker of the House, and JAMES ELLSWORTH, President Pro-Tem of the Senate,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 6, 1978.

OPINIONS BELOW

The opinion of the District Court for the District of Idaho is unreported and is attached as Appendix B.

The opinion of the Court of Appeals for the Ninth Circuit is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on January 6, 1978, and a copy thereof is appended to this petition in Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND LAWS INVOLVED.

The United States Constitutional provisions involved are:

a. Article 4, Section 3, which provides the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

b. Article 6, which provides this Constitution and the laws of the United States shall be the supreme law of the land.

The federal statutes involved are:

a. Organic Act of Territory of Idaho, 12 Stat L 808, Ch 117 (1863) Section 14.

b. Idaho Admission Act, 26 Stat L 215, Ch 656 (1890) Sections 1, 4, 5 and 7.

The State Constitutional provisions involved are:

Article 9, Sections 3 and 4, Constitution of State of Idaho.

The constitutional provisions and statutes are set out verbatim in Appendix C.

QUESTION PRESENTED

In an action filed to seek recovery of substantial losses to the Public School Endowment Fund, a trust fund created by Congress in the Idaho Admission Act, the District Court found: (1) federal question jurisdiction existed and (2) the case did not fall within any of the three areas justifying abstention. However, the District Court dismissed the action on the basis of *Colorado River Conservation District* v. *United States* 424 U.S.800 (1976). The Court of Appeals affirmed.

The question presented is whether the District Court's dismissal was in error when:

1. The District Court had a duty to exercise federal jurisdiction;

2. There was no clear justification to warrant a dismissal under the principles announced in *Colorado River Conservation District, supra;*

3. There was a substantial conflict between a recent state supreme court decision and United States Supreme Court "full benefit" doctrine as stated in *Lassen* v. *Arizona* 385 U.S. 458 (1967);

4. There were important and substantive federal

questions involving interpretation of the Idaho Admission Act, and involving funds held in trust that were not property of the state;

5. There were no unresolved state law issues;

6. There was no state court proceeding pending when jurisdiction of the District Court was invoked or at the time of dismissal.

STATEMENT

Petitioner, as custodian of the Public School Endowment Fund, filed a Complaint in the United States District Court for the District of Idaho on April 26, 1976, alleging in Paragraph I: 1) This action arises under the Idaho Admission Act, 26 Stat L215 (1890), 2) that the matter in controversy exceeds $10,000.00, and that jurisdiction exists pursuant to 28 U.S.C. §1331. The remainder of the Complaint asserted two claims for the benefit of the school children of Idaho, who are beneficiaries of the Public School Endowment Fund. The two claims were originally presented to and denied by the State Board of Examiners. The first claim relates to losses to the Public School Endowment Fund involving sale of U.S. Government Bonds and while the second claim involves the improper diversion and use of interest to pay expenses of the Idaho Investment Board. The first claim in Paragraph VIII of the Complaint indicates the losses to the Public School Endowment Fund took place as follows:

"a. from March 25, 1969 to June 30, 1970, in the sum of $1,319,382;

b. from July 1, 1971 to June 30, 1972, in the sum of $2,651,843;

c. from July 1, 1972 to June 30, 1973, in the sum of $26,477."

None of these losses have ever been made up by the State of Idaho, even though the Idaho Constitution, Article 9, Section 3, provides: "The state shall supply all losses thereof that may in any manner occur." The Idaho Admission Act, Section 1, provides:

> "The constitution of which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified and confirmed."

This first claim raised substantial federal law question, including the following:

1. Whether the "full benefit" doctrine announced in *Lassen* v. *Arizona*, 385 U.S. 458 (1967), was in conflict with state court decisions allowing almost unlimited discretion to the legislature in the manner in which losses were recognized and made up.

2. Whether the Idaho Admission Act establishes a *permanent* school fund, which means the state in a timely and complete manner must supply losses so beneficiaries will have full benefit of congressional land grants.

On October 22, 1976, Respondents filed a Motion to Dismiss, claiming the District Court did not have sub-

ject matter jurisdiction and also seeking dismissal on the ground the District Court should abstain from consideration of the case.

There was no state court proceeding pending at the time the federal action was filed. Later, on September 3, 1976, petitioner filed for a Petition for Writ of Mandate or Prohibition in the Idaho Supreme Court against the Investment Board of the State of Idaho. The Investment Board is not a party to this action. One issue included in that state case was whether the state constitution prohibited the use of interest for the expenses of the Investment Board. This state issue was resolved in *Moon* v. *Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977), decided on March 1, 1977. This case prohibited future diversions of interest, but did not remedy any past diversions.

The United States District Court issued its memorandum decision on March 9, 1977, deciding: (1) it had subject matter jurisdiction on the basis "the grant of public lands and the condition of the grant in the Idaho Admission Act present a substantial federal question;" and (2) it would grant defendants' Motion to Dismiss "in consideration of wise judicial administration." In its Memorandum Decision, the District Court indicated this case did not fall within the three categories in which a federal court may abstain but based its decision on *Colorado River Water Conservation District v. United States, supra.* Thereafter, plaintiff filed a motion to reconsider, which was denied. A timely appeal was taken from the order of dismissal to the Ninth Circuit Court of Appeals. An opinion was

filed on January 6, 1978, which found there was subject matter jurisdiction, but held that the District Court acted wisely in dismissing the case under the doctrine of *Colorado River Water Conservation District, supra.*

In its opinion, the Court of Appeals found the United States had a continuing interest in insuring that the conditions of the federal grant are satisfied, but decided the state courts could deal with the problem. The Court also stated petitioner's second claim was moot. The Idaho legislature, by Chapter 188, Section 5, Idaho Session Laws, 1977, did appropriate $994,200 to the Public School Income Fund to repay current and past diversions. However, it has not been determined if the sum appropriated was correct, or if it repaid in full the sums diverted plus interest.

REASON FOR GRANTING THE WRIT

THE DISTRICT COURT HAD A DUTY TO EXERCISE FEDERAL JURISDICTION.

The decision below should be reviewed because it has decided an important federal question in conflict with the congressional mandate that the District Court exercise jurisdiction over a case involving a federal question.

One of the fundamental principles reaffirmed in *Colorado River Conservation District v. United States, supra,* was stated at 813:

> "Abstention for exercise of federal jurisdiction is the exception, not the rule."

Both the District Court and the Court of Appeals found subject matter jurisdiction in this case. However, the courts below ignored the duty of the District Court to take jurisdiction. They have incorrectly made abstention the rule, rather than the exception. They have erroneously decreed an exception to federal jurisdiction for cases involving conditions attached to Congressional grants of public lands to states.

When it is conceded that a federal question is presented, the District Court had a duty to take jurisdiction. In *England* v. *Louisana Medical Examiners*, 375 U.S. 411 (1964), it was stated at 415:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' Willcox v. Consolidated Gas Co., 212 US 19, 40, 53 L ed 382, 394, 29 S Ct 192, 48 LRA NS 1134."

The Court explained the doctrine of abstention does not require or support an abdication of federal jurisdiction, stating at 415-416:

> "Nor does anything in the abstention doctrine require or support such a result. Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' Louisiana P. & L. Co. v. Thibodaux, 360 US 25, 29, 3 L ed 2d 1058, 1962, 79 S Ct 1070. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.' Harrison v. NAACP, 360 US 167, 177, 3 L ed 2d 1152, 1158, 79 S Ct 1025; accord, Louisiana P. & L Co. v. Thibodaux, supra, 360 US, at 29, 3 L ed 2d at 1062."

The Court also explained that an appeal to the United States Supreme Court from a state court decision was an inadequate substitute for the initial District Court determination, at 416:

> "But such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination — often by three judges, 29 USC §2281 — to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact."

In *Zwickler* v. *Koota* 389 U.S. 241 (1976) the court reaffirmed the primacy of the federal courts as interpreters of federal law, stating at pages 251-252:

> "For the 'recognition of the role of state courts as the final expositors of state law implies no disre-

gard for the primacy of the federal judiciary in deciding questions of federal law.' "

II

THERE WAS NO CLEAR JUSTIFICATION TO WARRANT A DISMISSAL UNDER THE PRINCIPLES OF THE COLORADO RIVER CONSERVATION DISTRICT CASE.

The decision below should be reviewed because it represents an unwarranted extension of the narrow exception announced in the *Colorado River Conservation District* case. The court formulated a narrow and limited exception to be applied in unique circumstances to permit dismissal of a federal suit due to concurrent state proceedings. It was stated at 818:

> "Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention."

As pointed out earlier, there was no state court proceeding when jurisdiction of the District Court was invoked. The state case that did arise had actually ended before the District Court's dismissal took place.

In marked contrast to *Colorado River Conservation District*, this case does not involve any clear federal policy favoring concurrent state court jurisdiction,

such as the McCarran amendment. There is no state law establishing a single, continuous proceeding for adjudication of the rights involved in this case. There is not the extensive involvement of 1000 defendants whose rights depend on state law. There is no distance factor in this case, since the parties are located in the same city where the U.S. District Court is located. There are no existing proceedings in various divisions of the state court. The exceptional circumstances present in the *Colorado River Conservation District* just do not exist here.

The court in the *Colorado River Conservation District* case stated, at 819:

> "Only the clearest of justifications will warrant dismissal."

The rationalizations stated for the decisions below are:

(1) The suit is between two branches of state government;

(2) The restrictions in the Idaho Admission Act are substantially similar to those of the state constitution.

However, these rationalizations are not sufficient to warrant dismissal under the narrow exception of the *Colorado River Conservation District* case. The decisions below would carve out a new exception not contemplated by Congress nor this court.

These rationalizations also fail to recognize the essential nature of the lawsuit. The petitioner is suing in her capacity as the custodian of the Public School Endownment Fund. The moneys involved are not state funds, but rather are held in trust for the benefit of the present and future school children of Idaho. *United States* v. *Fenton* 27 F.Supp 816 (D. Idaho 1939) The petitioner seeks to have restored to this trust fund losses that have existed for several years. The trust fund was created by Congress by grants of public lands to the state. The state constitution was adopted August 6, 1889, ratified by the people in November, 1889, and was approved and ratified by Congress in the Idaho Admission Act on July 3, 1890.

III

ABSTENTION SHOULD NOT BE EXERCISED WHERE FEDERAL-STATE CONFLICT EXISTS.

The decision below should be reviewed because there was an important federal-state conflict to be resolved. This conflict is between the "full benefit" standard recognized in *Lassen* v. *Arizona* 385 U.S. 458 (1967) and the Idaho Supreme Court decisions that permit the state to exercise almost complete discretion as to defining losses and making them up.

The full benefit doctrine indicates the beneficiaries of the Public School Endowment Fund should not be given less than full benefit of the federal grants in the Admission Act.

In *Lassen* v. *Arizona, supra,* this Court stated, at page 468:

> "Nothing in these restrictions is explicity addressed to acquisitions by the State for its other public activities; the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purpose of Congress require that the Act's designated beneficiaries 'derive the full benefit' of the grant. The conclusive presumption of enhancement which the Arizona Supreme Court found does not in our view adequately assure fulfillment of that purpose, particularly in the context of lands that are as variegated and far-flung as those comprised in this grant."

The Court went on to impose a standard arising from its interpretation of the Arizona Enabling Act, stating at pages 469-470:

> "We hold therefore that Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands. This standard most nearly reproduces the results of the auction prescribed by the Act, and more consistently reflects the essential purposes of the grant."

In contract to the "full benefit' 'doctrine, the Idaho Supreme Court is committed under state law to the view that the definition of losses and the manner in which losses are supplied by the state is left almost entirely to legislative discretion. The Court announced this view in *Idaho Gold Dredging Co.* v. *Balderston,* 58 Idaho 692, 78 P.2d 105 (1938), where it was stated at 58 Idaho 722:

> ". . . and the manner in which losses therein must be supplied by the state, required by art. 9, sec. 3, is left without limitation, other than constitutional, to the discretion of the legislature."

This view was reaffirmed in *Moon* v. *Investment Board*, 96 Idaho 140, 525 P.2d 335 (1974).

Proper application of the federal supremacy doctrine provides a substantial and valid reason for invoking federal jurisdiction and for not abstaining in its exercise. In *Colorado River Water Conservation District* v. *United States*, *supra*, the court specifically noted "the absence of weightier considerations of constitutional adjudication and state-federal relations." (424 U.S. 818). The decisions below ignored this aspect of the *Colorado River* case.

IV

IMPORTANT AND SUBSTANTIVE FEDERAL QUESTIONS WERE UNRESOLVED.

The decision below should be reviewed because there were important and substantive federal questions involving Congressional intent in the Idaho Admission Act left unresolved. Congress granted public lands to the state upon certain conditions. Petitioner's first claim is based upon the grants made under Sections 4, 5 and 7 of the Idaho Admission Act. Section 4 sets aside in every township the land in Sections 16 and 36 for support of common schools. Section 5 provides that the proceeds from sale of this land "constitute a permanent school fund, the interest of which only shall be expend-

ed in the support of said schools." Section 7 provides for 5% of the proceeds of sale of public lands in the state by the United States shall be paid to the state to be used as permanent school fund under the same restriction regarding the interest.

Do these sections "mean the state in its trustee capacity should make up losses?" If a "permanent" fund is depleted by losses, when must they be restored? Does the "full benefit" doctrine require the state to honor claims presented to the State Board of Examiners? Is interest due on the nearly four million in losses because the state has delayed payment for years?

V

ABSTENTION SHOULD NOT BE INVOKED WHEN THERE ARE NO UNRESOLVED STATE LAW ISSUES.

The decision below should be reviewed because it represents a significant departure from one of prime factors for abstention. This factor is that there are unsettled issues of state law. In this case, the state constitutional and statutory provisions are clear and unambiguous, and have been interpreted by the Idaho Supreme Court. See *State* v. *Fitzpatrick*, 5 Idaho 499, 51 Pac. 112 (1897) and *Moon* v. *Investment Board*, *supra*, (1974). The courts below should have followed the rules stated in *Davis* v. *Mann* 377 U.S. 678 (1964):

The Court, in *Davis* v. *Mann*, stated at pages 690-691:

"Appellants' contention that the court below should have abstained so as to permit a state court to decide the questions of state law involved in this litigation is without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. McNeese v. Board of Education, 373 US 668, 10 L ed 2d 622, 83 S Ct 1433. This is especially so where, as here, no state proceeding has been instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts."

VI

ABSTENTION SHOULD NOT BE INVOKED WHEN NO STATE PROCEEDING WAS PENDING.

The decision below should be reviewed because it also departs from established concepts that a suit should not be dismissed merely because a state court could entertain it. This court stated in the *Colorado River Conservation District*, case at pages 813-814:

> "'(I)t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.' Alabama Pub. Serv. Comm'n v. Southern R Co. 341 US 341, 361, 95 L ed 1002, 71 S Ct 762 (1951) (Frankfurter, J., concurring in result)."

VII

REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICT

The decision below should be reviewed because it conflicts with the decision in *Timmons* v. *Andrews* 538 F.2d 584 (4th Cir. 1976). The Court in *Timmons* stated at page 585:

> "There is no action pending in a state court having concurrent jurisdiction. The city officials do not suggest that the state law is unsettled or that resolution of the state law issues will dispose of the case without consideration of the federal questions. Therefore, the traditional grounds for abstention in civil actions, recently reviewed in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 813, (1976) 96 S Ct 1236, 1244, 47 L.Ed.2d 483, are not present. In the absence of such considerations, a federal court has no power to decline to decide a case that is properly before it, as this one concededly was. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 403, 5 L.Ed. 257 (1821)."

CONCLUSION

For the reasons indicated, it is respectfully submitted that this petition for writ of certiorari should be granted.

DATED this ..... day of March, 1978.

Wayne P. Fuller
Special Assistant Attorney General
State of Idaho
Post Office Box 130
Caldwell, ID 83605

STATE OF IDAHO)
) ss.
County of Canyon)

WAYNE P. FULLER, being first duly sworn, deposes and says: That he is the attorney representing petitioner in the above entitled case. That on the date stated below, he served the Petition for Writ of Certiorari upon Guy G. Hurlbutt, Deputy Attorney General, State of Idaho, Boise, Idaho, counsel for respondent, by depositing three copies thereof in a United States Post Office, with United States postage prepaid on the ..... day of March, 1978.

.....
Wayne P. Fuller

SUBSCRIBED AND SWORN to before me this ..... day of March, 1978.

.....
Notary Public for Idaho
Residing at Caldwell, Idaho

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE STATE O FIDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,
Plaintiff-Appellant,
v.
STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through ALLAN F. LARSEN, Speaker of the House, and JAMES ELLSWORTH, President Pro-Tem of the Senate,
Defendants-Appellees.

FILED
Jan. 6, 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals
No. 77-2157
OPINION

Appeal from the United States District Court for the District of Idaho

Before: ELY, WRIGHT and CHOY Circuit Judges.

WRIGHT, Circuit Judge:

This action was one of several brought by the Treasurer of the State of Idaho against the State Board of Examiners and the State Legislature. *See Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977); *Moon v. Investment Board*, 96 Idaho 140, 525 P.2d 335 (1974). Appellant asserts two claims for relief: (1) for alleged losses to the Public School Endowment Fund, and (2) for recovery of interest derived from

the Public School Endowment Fund used to pay the expense of the Investment Board.

In a parallel action the Idaho Supreme Court held that the use of interest for the purpose of defraying expenses of the Investment Board was improper, invalidating the statutory authority for such use as unconstitutional. *Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977).

On appellees' motion to dismiss, the district court found subject matter jurisdiction over the suit, but granted the motion. Recognizing that the case does not fall within any of the three areas traditionally justifying abstention, the court concluded that *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), justified dismissal in another category of situations where "principles rest[ing] on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' " were involved. C.R. 44 (Memorandum) *quoting Colorado River Water Conservation District, supra* (citation omitted).

This appeal is from that dismissal.

We first consider the issue of federal jurisdiction. The Idaho Admission Act, which adopted and ratified the Idaho State Constitution, does not support federal jurisdiction over any suit founded on a state constitutional provision so adopted and ratified. If it did, every state constitutional claim in any state admitted to the

Union pursuant to an Admission Act would become *pro tanto* a federal question supporting jurisdiction in the federal courts. All such state claims assuredly do not support federal jurisdiction. Mere ratification of state legislation by an Admission Act is not sufficient to support jurisdiction in the federal courts.

In this case, however, we have more than mere ratification of state-created rights. As the district court noted, this suit concerns conditions attached to the grant of public lands to the state of Idaho. Hence, a substantial federal question is presented, and the district court correctly found subject matter jurisdiction.

United States v. Fenton, 27 F. Supp. 816, 819 (D. Idaho 1939), supports this holding. It is significant that *Fenton* also involved interpretation of conditions to a grant of land by the United States. Thus, neither *Fenton* nor our holding in this case supports a finding of federal jurisdiction for all suits brought under an Admissions Act.

Although the court did have jurisdiction over the suit, we think nevertheless that it acted wisely in dismissing it under the doctrine announced in *Colorado River Water Conservation District, supra*. The suit is one between two branches of state government, and involves the interpretation of state constitutional provisions substantially similar to those in the Idaho Admissions Act.

While the United States does have a continuing in-

terest in insuring that the conditions of the grant are satisfied, *see Lassen v. Arizona*, 385 U.S. 458 (1976), the state political and judicial processes have not been shown to be incapable of dealing with the problem. As noted above, related suits have been brought in the Idaho State courts, and appellant appears to have been treated favorably there. Indeed, it even appears that *Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977), coupled with the state legislature's response, *see* ch. 188, 1977 Idaho Session Laws, render appellant's second claim moot.

Appellant has shown no reason to justify the fracturing of this dispute between branches of the state government into several suits, or to justify their dispersal through state and federal forums. Sound judicial policy requires the "comprehensive disposition of litigation." That was the concern expressed by the Supreme Court in *Colorado River Water Conservation District, supra*, and that was the same concern expressed by the district judge.

We conclude that the district judge acted properly and wisely in dismissing the suit. Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho, Plaintiff, vs. STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through ALLAN F. LARSEN, Speaker of the House, and JAMES ELLSWORTH, President Pro-Tem of the Senate. Defendants.	U.S. Distirct Court District of Idaho March 9, 1977 Jerry L. Clapp, Clerk Civil No. 1-76-72 Memorandum

Plaintiff filed this action in federal court April 26, 1976, arising under the Idaho Admission Act §§ 4, 5, 7 (26 Stat. L 215, 1890). The amount in controversy allegedly exceeds $10,000.00, and plaintiff asserts jurisdiction in this court pursuant to 28 U.S.C. § 1331. The defendants, State Board of Examiners, et al, filed a motion to dismiss (1) for lack of subject matter jurisdiction (i.e., that the plaintiff did not present a federal question), and (2) for failure to state a claim upon which relief may be granted (i.e., that adequate judicial remedies and special circumstances require this Court to abstain from consideration of the case). The defendants' motion will be discussed in the order presented to the Court.

1. In order to present a federal question for purposes of jurisdiction under 28 U.S.C. § 1331(a), the question must be basic rather than collateral, necessary rather than merely possible. *Gully v. First National Bank*, 299 U.S. 108 (1936). It is the defendants' position that the provisions of the Idaho Constitution with similar limitations on expenditures of proceeds from school land grants (Article 9, Sections 3, 4, 11, Idaho Constitution) present an alternative to §§ 4, 5, and 7 of the Idaho Admission Act and therefore a construction of the federal act would be of collateral importance only. It is the opinion of this Court, however (previously articulated in *United States v. Fenton*, 27 F. Supp. 816, 819 (D.C. Idaho 1939)), that the grant of public lands and the conditions of the grant in the Idaho Admission Act present a substantial federal question.

2. Next, the defendants urge the Court to dismiss this action by reason of the Abstention Doctrine. The federal courts have a duty to adjudicate matters over which they have jurisdiction, and only with narrowly limited exceptions may they abstain from adjudicating. The aims of abstention are twofold — avoiding premature constitutional questions and avoiding unnecessary interference with a state's internal administration. More specifically, the areas in which a federal court may abstain are limited to three (1) cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law; (2) cases where federal jurisdiction has been invoked to restrain

a state criminal proceeding, state nuisance proceedings antecedent to a criminal prosecution, or the collection of state taxes; and (3) cases where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar. *Colorado River Water Conservation District v. U.S.*, —U.S. —, 47 L Ed2 483 (1976).

Even where a case does not lie within one of the three areas of exception, however, there are situations which justify and require dismissal by a federal court. As stated in *Colorado River Water Conservation District v. U.S.*, supra, "these principles rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." It is noted in that opinion that only the clearest of justifications will warrant dismissal. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. While the *Colorado River* case involved concurrent jurisdiction and questions of state law, the principles dictating dismissal nevertheless apply to this case.

The limitations placed on expenditures by the Admission Act are also found in the Idaho Constitution and I.C. § 57-727; this dispute exists solely between arms of the state government; and the Idaho Supreme Court has already construed the applicable provisions

of state law to the plaintiff's satisfaction. This Court, following the principles expressed in *Colorado River Water Conservation District*, supra, therefore in consideration of wise judicial administration,

GRANTS the defendants' Motion to Dismiss.

DATED this 9th day of March, 1977.

MARION J. CALLISTER
United States District Judge

APPENDIX C

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Article 4, Section 3:

"New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states; or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular states."

Article 6:

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Idaho Constitution:

Article 9, Section 3:

"The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided."

§4. The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands, and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated under the laws of the state; and all other grants, gifts, devises, or bequests made to the state for general education purposes."

Idaho Admission Act:

"§1. The state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be,

and the same is hereby, accepted, ratified and confirmed."

"§4. School lands.—Sections numbered 16 and 36 in everytownship of said state, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior."

"§5. Sale or lease of school lands.—(a) Except as provided in subsection (b) all lands herein granted by educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. Such lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than ten years, and in the case of an oil, gas, or other hydrocarbon lease or a geothermal resource and associated by-products lease, for as long thereafter as such product is produced in paying quantities or the lessee in good faith is conducting well drilling or construction operations, and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

(b) Such lands may be exchanged for other lands, public or private. The values of such lands so exchanged shall be approximately equal or, if they are not approximately equal, they shall be

equalized by the payment of money by the appropriate party. If any such lands are exchanged with the United States, such exchange shall be limited to Federal lands within the State that are subject to exchange under the laws governing the administration of such lands. All such exchanges hereto fore made with the United States are hereby approved."

"§7. Public lands—Sale—Per cent paid state for school fund.—Five per cent of the proceeds of the sales of public lands lying within said state which shall be sold by the United States subsequent to the admission of said state into the union, after deducting all the expenses incident to the same, shall be paid to the said state, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said state."

Organic Act:

> §14. School lands.—When the lands in the territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

28 U.S.C. 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U.S.C. 1331:

> "(a) The district courts shall have original jurisdiction of all civil action wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1977

No. 77-1396

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,

Petitioner,

v.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through ALLAN F. LARSEN, Speaker of the House, and JAMES ELLSWORTH, President Pro-Tem of the Senate,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the District Court and the Opinion of the United States Court of Appeals for the Ninth Circuit are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the United States Court of Appeals for the Ninth Circuit commit error in abstaining from taking jurisdiction over an action brought against the State Board of Examiners and State Legislature of Idaho by the State Treasurer to recover alleged losses to the Idaho Public School Endowment Fund, on the grounds that abstention should be granted within the meaning of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) where "principles resting on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' were involved".

CONSTITUTIONAL PROVISIONS, STATUTES, AND LAWS INVOLVED

The constitutional provisions, statutes and laws involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's Complaint, filed in the United States District Court for the District of Idaho on April 26, 1976, revolves around alleged losses to the Public School Endowment Fund of the State of Idaho. Petitioner forwarded two claims for relief in that Complaint. The first involved an alleged loss to the Public School

Endowment Fund resulting from the sale of United States Government Bonds by the Endowment Fund Investment Board. The second claim concerned use of interest derived from the Public School Endowment to pay the expenses of the Investment Board.

On September 17, 1976, Petitioner filed an action in the Idaho State Supreme Court entitled *Moon* v. *Investment Board* seeking an Alternative Writ of Prohibition against the Board. Numerous alleged illegal practices were asserted. One of the issues raised in that case is identical to the second claim for relief in the Complaint in the instant case. However, unlike this case, Petitioner was not attempting to regain alleged losses paid out by the Investment Board in prior years. Rather, the State action was designed to prohibit the Investment Board from continuing such activities.

The Idaho Supreme Court quashed all of the issues presented except the issue concerning payment of expenses from the School Endowment Fund. In *Moon* v. *Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977), the Court held that transfer of earnings from public school funds for the purpose of defraying expenses of the Investment Board was improper, and found the statutory authority allowing such authority to be unconstitutional. The Legislature, in response to the State Supreme Court decision, appropriated a sum of money to compensate the Fund for monies paid for expenses of the Investment Board in prior years. The legislative language, codified in Chapter 188, 1977 Idaho Session Laws, is as follows:

> Section 5. There is hereby appropriated from the general account to the public school income fund the amount of $994,200.00 for full and final payment of expenditures incurred and paid in current and prior years by the endowment fund investment board from earnings on public school endowment fund investments.
>
> Approved March 30, 1977.

The District Court by Memorandum Decision dated March 9, 1977, (App. B of Petition, p. 23) concluded that subject matter jurisdiction over the case existed through the Idaho Admission Act, 26 Stat.L. 215 (1890). However, the Court granted Respondent's Motion to Dismiss "in consideration of wise judicial administration". (App. B of Petition, p. 26). The Court of Appeals affirmed the judgment of the District Court. (App. A of Petition, p. 19). In the words of the Court of Appeals:

> Although the court did have jurisdiction over the suit, we think nevertheless that it acted wisely in dismissing it under the doctrine announced in Colorado River Water Conservation District, supra. The suit is one between two branches of state government, and involves the interpretation of state constitutional provisions substantially similar to those in the Idaho admissions act. (App. A of Petition, p. 21).

The Court of Appeals concluded that Petitioner's dispersal of the issues between State and Federal forums violated the policy requiring comprehensive disposition of litigation. (App. A of Petition, p. 22).

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner contends that the decision of the Court of Appeals is in conflict with the requirements of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) and other decisions of this Court. However, on close review, the conflict quickly dissolves. Although numerous decisions stress the need to use abstention sparingly, this Court has through the years been willing to keep abstention as a viable doctrine and to broaden its horizons. This is apparent from a reading of *Colorado River Water Conservation District* v. *United States*, *supra*. The Court concluded that the McCarren Amendment, 43 U.S.C. §666, did not preclude District Court jurisdiction under 28 U.S.C. §1345. However, the Court considered the fact that a similar action concerning an adjudication of water rights was pending in the State Courts of Colorado. Although the Court found absent the three broad categories for abstention frequently cited, it continued to examine the facts of the case and concluded that abstention was nevertheless appropriate:

> Although this case falls within none of the abstention categories there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous

> exercise of concurrent jurisdiction, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation.' [citations omitted]. 424 U.S. at 817.

The Court went on to say:

> In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum [citation omitted], the desirability of avoiding piecemeal litigation [citation omitted], and the order in which jurisdiction was obtained by the concurrent forums [citation omitted]. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors councelling against that exercise is required [citation omitted]. 424 U.S. at 818-819.

When this case is viewed in the light of "considerations of wise judicial administration", it becomes apparent that the Court of Appeals did not err in granting abstention for this reason. The Idaho Admission Bill, 26 Stat.L. 215 (1890), which provided the basis of federal question jurisdiction, is only peripherally involved in the instant litigation. The primary thrust of this case, as noted by the Circuit Court, is a suit "between two branches of state government, and involves the interpretation of state constitutional provisions substantially similar to those in the Idaho Admissions Act". (App. A of Petition, p. 21). The challenges raised by

Petitioner turn ultimately, not on the Idaho Admission Act, but on an interpretation of Article IX, §§3 and 4, *Idaho Constitution* and State statutes enacted in compliance with these constitutional provisions. Interestingly, each of the provisions referred to by Petitioner in her Complaint are contained in the cited State constitutional sections.

As earlier observed, Petitioner's second claim for relief was addressed by the State Supreme Court of Idaho in *Moon* v. *Investment Board*, 560 P.2d 871 (Idaho 1977). The State Court granted the relief sought by Petitioner. However, the claim made in State Court did not include a demand for monies previously paid from the Permanent School Fund for expenses of the Endowment Fund Investment Board. This, of course, was subsequently appropriated by the Idaho Legislature. In any event, Petitioner at that time could easily have avoided piecemeal litigation by bringing the entire claim for review before the Supreme Court of Idaho. This could also easily have been done as to claim one in the Complaint. Avoidance of piecemeal litigation through abstention was specifically referred to in *Colorado River Water Conservation District*, *supra*. In addition to *Moon* v. *Investment Board*, *supra*, it is instructive to observe that similar claims have been brought in the past in the State Courts of Idaho. See e.g., *Moon* v. *Investment Board*, 96 Idaho 140 (1974), and *Engelking* v. *Investment Board*, 93 Idaho 739 (1970).

When the facts are carefully reviewed, it becomes clear that this Complaint represents a dispute between entities

within State government concerning management of State funds which should be decided by the State Courts in Idaho. Whether or not the government bonds were sold at a loss by the Endowment Investment Board is a question of fact that will ultimately turn on an interpretation of State law. Also, whether or not expenses paid to the Board from the Fund in prior years should be replaced into the Fund is properly a question for the Idaho Legislature. A suit against the Idaho Legislature and the constitutionally created Board of Examiners strikes at the very heart of this State's policy making entities and should be avoided in Federal Court if at all possible.

In short, the Idaho Admission Bill was used by Petitioner simply as a means to gain access into Federal Court. The issues genuinely involved State statutory interpretation and the Idaho Constitution. The claims also concern decisions made by the highest authorities in the State of Idaho and go to the heart of this State's policy decisions. The Treasurer of the State of Idaho has many times in the past presented similar claims to the Idaho State Courts. There is no contention that the State Courts have ever failed to grant these claims a fair review. In fact, analysis of recent decisions discloses that Petitioner has largely been successful in the Courts of Idaho. The need to grant abstention under the holding of *Colorado River Water Conservation District*, *supra*, was aptly explained by the Circuit Court of Appeals:

> Appellant has shown no reason to justify the fracturing of this dispute between branches of the state government into several suits, or to justify

> their dispersal through state and federal forums. Sound judicial policy requires the "comprehensive disposition of litigation." That was the concern expressed by the supreme court in Colorado River Water Conservation District, supra, and that was the same concern expressed by the district judge.
>
> We conclude that the district judge acted properly and wisely in dismissing the suit. Affirmed. (App. A of Petition, p. 22).

Contrary to the contentions of Petitioner, the decision of the Court of Appeals carefully follows the principles expressed by this Court in *Colorado River Water Conservation District*, *supra*.

II

THE DECISION OF THE COURT OF APPEALS IS NOT ERRONEOUS AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

The doctrine of abstention is judgemade law, having its origin in the case of *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496 (1941). Principally, it is an equitable doctrine, giving rise to discretionary consideration by the Court. The Doctrine recognizes the intricate balance between the State and Federal systems and attempts to avoid needless friction with policies of the States. See *Druker* v. *Sullivan*, 458 F.2d 1272 (1st Cir. 1972). For this reason Courts considering abstention must carefully balance the competing consideration involved and in so doing, it is obvious that "the doctrine of abstention cannot readily be reduced to a simple

formula. 'There have been as many and as variegated applications of this supple principle as the situations that have brought it into play' ". *Diaz Gonzalez* v. *Colon Gonzalez*, 536 F.2d 453 (1st Cir. 1976), Citing *Railroad Commission* v. *Pullman Company*, *supra* at page 500.

Analysis of the District Court Memorandum Opinion and Decision of the Circuit Court reveals that both jurisdictions were careful to comply with this Court's language in *Colorado River Water Conservation District*, *supra*. In considering abstention, this Court said:

> No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors councelling against that exercise is required. 424 U.S. at 818-819.

The Court, after carefully weighing abstention within the light of the above quote, dismissed the case for wise judicial administration on the grounds that the Federal Courts provided an inconvenient forum and Plaintiff had engaged in piecemeal litigation concerning the same issues between the State and Federal Courts.

Petitioner's contention that the decision of the Court of Appeals conflicts with the decisions of other circuits also is in error. Petitioner maintains that the decision below conflicts with *Timmons* v. *Andrews*, 538 F.2d 584 (4th Cir. 1976) as far as abstention is concerned. The decision in *Timmons* conflicts not at all with the Courts opinion below. This is true for two reasons. First, the Court in *Timmons* found that there was no suggestion

indicating "that resolution of the state law issues will dispose of the case without consideration of the federal questions". 538 F.2d at 585. In this case, Petitioner specifically appealed to the Idaho Supreme Court on portions of the very issues now raised in the federal forum. Had piecemeal litigation been avoided, the State Supreme Court decision would have been dispositive. In fact, it appears that Petitioner's second claim is moot because of that decision and legislative action taken pursuant thereto. This was not the case in *Timmons*. Secondly, the Fourth Circuit in *Timmons* did not consider whether the case should be dismissed under principles of wise judicial administration as ennunciated in *Colorado River Water Conservation District*, *supra*. Although the case is cited, it is referred to merely to indicate the three *traditional* grounds for abstention in civil actions. This Court's holding in *Colorado River Water Conservation District* was in no way reviewed by the Fourth Circuit.

III

THE GENERAL REASONS FOR REVIEW ON CERTIORARI SPECIFIED IN RULE 19, SUPREME COURT RULES, ARE ABSENT.

Considerations governing review on certiorari of decisions of the Federal Courts of Appeal are contained in Rule 19(b), Supreme Court Rules. Review of the reasons stated in Rule 19, Supreme Court Rules, does not suggest any reason applicable to this situation. As the Circuit Court below stated:

> The suit is one between two branches of state government and involves the interpretation of state

constitutional provisions substantially similar to those in the Idaho Admissions Act. (App. A of Petition, p. 21).

In short, the issues raised in this action involve internal management decisions of Idaho State government. The reason for the dismissal was abstention. The decisions below were carefully fashioned under the requirements of *Colorado River Water Conservation District*, *supra*, and no substantial federal questions are presented.

CONCLUSION

Rule 19(1), Supreme Court Rules, provides in part that "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefore". The Courts below have carefully followed the latest pronouncements on abstention by this Court. The issues in the case are confined specifically to various branches of government within the State of Idaho. No special and important reasons exist for a review by this Court on Writ of Certiorari. For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

DATED This 12th day of May, 1978.

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720

STATE OF IDAHO)
) ss.
County of Ada)

GUY G. HURLBUTT, being first duly sworn, deposes and says: That he is the attorney representing Respondent in the above-entitled case. That on the date stated below, he served the BRIEF FOR RESPONDENT IN OPPOSITION upon Wayne P. Fuller, Special Assistant Attorney General, State of Idaho, counsel for Petitioner, by depositing three copies thereof in a United States Post Office, with United States postage prepaid on the 12th day of May, 1978.

GUY G. HURLBUTT

SUBSCRIBED AND SWORN to before me this 12th day of May, 1978.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho